Releasing minorities from the "nationalist trap": from territorial to personal autonomy in a "multiple demoi europe"*

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Abstract: Although minority rights are already part of the European acquis, the protection of minorities as set forth in European national legislations still hinges upon the territorial paradigm. This 'Westphalian model' of minority protection is increasingly being questioned by the claims of "new minorities" (migrants) and traditional European non-territorial minorities (Roma). This article discusses Renner's model of national cultural autonomy in the light of its first Ottoman application (Millet) and its current adaptation in the legal system of Middle-East Europe, as a potential instrument to overcome the 'Western' European 'territorial trap'. By looking Eastward, Europe may adapt the Millet system to its specific exigencies, in order to create an inclusive supranational geo-political-legal space for effectively managing diversity and for including minority rights into the process of 'integration through law".

Keywords: non-territorial minorities, migrants, Roma, Millet, national-cultural autonomy.

Resumen: *A pesar de que los derechos de las minorías son parte integral del acervo europeo, su protección, tal y como actualmente está definida por las legislaciones europeas y nacionales, depende todavía de un paradigma principalmente territorial. La efectividad de este «modelo westfaliano» de protección, sigue siendo cuestionada por las reivindicaciones de las nuevas minorías (migrantes) y de las minorías tradicionalmente «no-territoriales (personas de etnia gitana)». Este artículo discute y analiza la posible aplicación y adaptación del modelo de «autono-*

mía cultural nacional», propuesto por Karl Renner sobre los sistemas jurídicos del Europa centro-oriental. A partir de la experiencia otomana del Millet, donde este modelo fue por primera vez creado y aplicado, el artículo propone un posible recurso para superar el «enredo territorial» que caracteriza sobre todo la Europa Occidental. Teniendo como punto de referencia a Oriente, Europa podría adaptar el sistema del millet a sus exigencias específicas, a fin de crear un espacio geo-político-jurídico supranacional para manejar la diversidad de manera efectiva incluyendo los derechos de las minorías en el proceso de «integración por ley».

Palabras clave: *minorías no-territoriales, migrantes, personas de etnia gitana, Millet, autonomía cultural nacional.*

I. **In varietate concordia**

Every year, on 9th May, Europe celebrates the Union with the motto "*in varietate concordia,*" its idea of political and social unity. This motto, adopted in 2000,[2] and officially translated in English as "united in diversity," nowadays constitutes one of the main grounds on which European identity is built, at least at the rhetorical level.[3]

The eloquence of this evocative expression has for long time confused the real sense of its words by relegating it to the dimension of "European patriotism." Indeed, questioning the meaning of the ideas enshrined in the expression "*in varietate concordia*" is much more than a rhetorical exercise. It deals with society. It deals with politics. It deals with law. It deals with the ideas of "State" and "Nation".

"*Varietas*" in Latin means "variety" in the sense of "diversity." Yet, which kind of diversity does the European motto refer to? To the diversity of states, which are by the way going to exceed the current number of 27? To the diversity of Nations, which, besides including the European States, may also include, broadly speaking, European non-State regions, European ethnic groups, and European minorities)? Or to the diversity of peoples that live in Europe— *i.e.*, European citizens, third country long-term residents,

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[2] The European motto was adopted through an informal process involving European pupils from different countries. See, *inter alia,* TOGGENBURG, G. "The Debate on European Values and the Case of Cultural Diversity." *European Diversity and Autonomy Papers*, 2004. pp. 1-24. www.eurac.edu/edap..

[3] BLOKKER, P., "The Post-enlargement European Order: Europe 'United in Diversity'?" *European Diversity and Autonomy Papers*, n.º 1, 2006, pp. 1-32 www.eurac.edu/edap. Although the motto and other European symbols, including the flag, anthem, Euro currency, and the European day) have lost legal recognition since entry into force of the Lisbon Treaty , they still represent official political symbols of the EU as stated in the 2004 European constitution. See http://europa.eu/abc/symbols.

and migrants? These questions acquire an additional degree of complexity if we consider that the European motto has been recognized, together with the other European symbols, as part of the pan-European heritage by the Council of Europe as well (which currently comprises 20 more States).[4]

"*Concordia*" in Latin means "harmony" in the sense of "peace." As in the case of "*varietas*," this word may also acquire different meanings entailing diverse political implications. As Johan Galtung clarifies,[5] peace can either refer to the absence of violence (negative peace) or to the creation of a social environment that serves the needs of the whole population by intervening in social relationships and by contributing to a constructive resolution of a conflict (positive peace). Emanuela Ceva has further elaborated on the meaning of *"concordia"* by questioning in the practical implications of the unitary project of the European Union.[6] Is the majority vote a sufficient condition for considering this project fully accomplished or should we consider other elements such as the quality of public debate? How can the ideal of tolerance be practically translated, through the creation of difference-blind institutions or through the political recognition of diversity as a value?

This article aims to provide answers, though partial and not "final," to the above-mentioned questions by examining the case of non-territorial minorities in Europe. This case study represents a privileged point of view to analyze how peaceful coexistence of diverse social groups and peoples can be attained in the European territory in a way that fulfills individual and collective rights. Indeed, minorities can be considered as "microcosms of nations" that live in one or more States, whose diversity from the majority of the population is often only partially recognized. In our opinion, this derives from the fact that the current political paradigm of State and Nation, as well as the legal tools ensuing from it, is still very much rooted in the old Westphalian conception of nation-state. Since this categorization links a group to a given territory, it is an inappropriate tool to effectively accommodate the claims of minority groups and people that lack these "territorial features." As Gualtiero Harrison explains,

> owing to contemporary migrations, from the South of the planet and from the East of the Continent, Western European society faces a huge cha-

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[4] See the address by Terry DAVIS, the Secretary General of the Council of Europe *"Role of the Council of Europe in the construction of a democratic Europe"* made at the Warsaw Summit, 14 May 2005 "Europe of Citizens: the political architecture of Europe and the citizen's influence on its shape" available at www.coe.int/summit.

[5] GALTUNG, J., *Peace By Peaceful Means: Peace and Conflict, Development and Civilization* (London: SAGE), 1996

[6] CEVA, E., "Introduzione: "In varietate concordia". Quali prospettive per un'etica pubblica europea?" *Notizie di Politeia,* vol. 25/95, 2009, pp. 3-15, at 4.

llenge on its capacity to find practical and political solutions and on its very theoretical and ideological traditions. Is it possible to issue a defence of equality that is able to save the world of differences? Is it possible to answer the demands and requests originating from the diverse collective identities (ethnical, cultural, and social)?[7]

The article firstly discusses the current legal framework of minority protection in Europe and highlights its theoretical difficulties and fallacies. Subsequently, it focuses on the case study of non-territorial minorities in Europe with a specific focus on the cases of migrants ("new minorities") and Roma (traditional non territorial minority) in order to detect, practically, the consequent legal limitations. We claim that the appropriate solution is to shift toward a new paradigm, which is based on personal autonomy, in order to "release" minorities from the "territorial trap" of the Westphalian model. To this purpose, Karl Renner's model on national autonomy is recalled and used as a theoretical starting point. The potentiality of this model and its possible application to the European case are studied by looking Eastward to the *millet* system, an Ottoman non-territorial solution to the coexistence of diverse ethno-religious groups within the same state. In conclusion, some critical remarks are drawn to discuss the viability and sustainability of this model.

II. Old boxes for new concepts: the current legal framework for the protection of minorities in Europe

The beginning of the history of the legal protection of minorities in Europe is very much connected with the ideas of "boundary" and "fear." Since the creation of the modern state with the peace of Westphalia, the integrity of the territory has been considered of vital importance for safeguarding external as well as internal attacks.[8] Accordingly, all minorities conceived as social groups holding any form of diversity from the majority (such as religion, language and culture) creating a sense of solidarity among them, were controlled by the national dominant groups by means of both physical and

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[7] HARRISON, G., *I Fondamenti Antropologici dei Diritti Umani,* ed. Meltemi, Roma, 2002, pp. 36-37.

[8] "The importance of territory in classic international law derives from the fact that the application of Roman law sources in medieval, feudal Europe created the belief that the territory was the object of State's property", MILANO, F., *Unlawful Territorial Situations in International Law,* ed. Martinus Nijhoff Publishers, Leiden, 2006, p. 67. This conception is still deeply rooted in current political thought since very often "the term sovereignty is used as synonym of territorial sovereignty" (*ibidem*).

cultural barriers. By doing so, the state could protect itself from any internal claim that could potentially lead to public disorder, or even worse, to its dissolution by mean of secession.

From the struggles for religious freedom starting in the 17th century, the protection of minorities in Europe has been conceived as a territorial solution to conflicts, whereby the ruler of a territory had the power to dictate a certain religion (*cuius regio eius religio*). Subsequently, the protection of diverse groups within European societies has expanded to other cultural and geographical areas[9] and during the 19th century it has become a common feature of European public law.[10]

By the end of the First World War, minority protection became an international concern. Yet, the "box" was renewed, but not its "content." The "minority regime" established by the Versailles Treaty was shaped with the view of stabilizing states' borders and diffuse conflicts.[11] In this framework, the protection of cultural diversity was certainly not the main goal. Humanitarian concerns about minority protection have arisen, though gradually, only by the end of the Second World War, and have been encapsulated within the human rights discourse.[12]

Nonetheless, the first international binding instruments on human rights protection that aimed to protect individuals from states' abuses of power were not apt to guarantee an effective protection of minorities. The wording of the provisions was often too general to effectively respond to minorities' peculiar claims. Additionally, the rights enshrined within human rights international treaties were frequently characterized by an individualistic vocation that could hardly respond to collective needs.[13] Only in the last decades, international and national laws have increasingly matured the idea that diversity cannot be effectively protected in the name of "equality"[14] but

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[9] From the Congress of Vienna of 1815 the protection of minorities in Europe started to be based on nationalist criteria as well. These criteria, together with religious ones, have been adopted by increasing number of European states such as Poland (whose religious and linguistic autonomy was granted under the international negotiations of the Congress of Vienna) Serbia, Montenegro and Bulgaria (whose autonomies were granted under the 1878 Berlin Treaty).

[10] THIO, L.A., *Managing the Babel: The International Legal Protection of Minorities in the Twentieth Century*, ed. Martinus Nijhoff Publishers, Boston, 2005, p. 22.

[11] *Ibid*., p. 30.

[12] GAYIN, E., *The Concept of Minority in International Law: A Critical Study of the Vital Elements*, ed. University of Lapland, Rovaniemi, 2001.

[13] JOVANOVIC, A.M., "Are there Universal Collective Rights?", *Human Rights Review*, n.º 11/4, 2010. pp. 17-44.

[14] "All human being are born free and equal in dignity and rights", Art. 1, Universal Declaration of Human Rights.

rather through *ad hoc* instruments tailored to fit the peculiar characteristics and the specific needs of each minority group.[15]

Europe has been one of the major contributors to this historical-legal process that led to the progressive sedimentation of culture and values on the protection of human rights and equality including the promotion of minority rights. Nowadays, a double-layered set of legal instruments focused on human and minority rights coexist in the European territory within the three regional organizations dealing with this subject: (a) the OSCE with 56 member States, (b) the CoE with 47 member States and (c) the EU with 27 member States.

a) The OSCE is the largest organization dealing with the protection of human and minority rights in Europe. It is a political organization, based on consensus, characterized by soft-law instruments, which are not legally binding. Especially over the last two decades, OSCE has undertaken several steps in elaborating international standards focused on minorities (Wright, 1996). The most notable institution in this realm is the High Commissioner on National Minorities (HCNM). This office monitors the situation of minorities within OSCE States and simultaneously assists states through recommendations and guidelines.[16]

b) The CoE has made of human rights, democracy and rule of law the cornerstones of its mission. The 1950 European Convention on Human Rights (ECHR) is the paramount instrument that this organization has created to deal with human rights in Europe. The protection and the enforcement of the rights enshrined in the ECHR are granted by the European Court of Human Rights (ECtHR). Although there is no substantive provision specifically referring to the respect of minorities in the ECHR,[17] the ECtHR has increasingly played a vital role in promoting respect for minority rights, by extensively interpreting the provisions of its institutive treaty.[18]

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[15] PALERMO, F., "Legal Solutions to Complex Societies: The Law of Diversity", in: RUIZ VIEYTEZ, E. (ed.), *Human Rights and Diversity: New Challenges for Plural Societies*, ed. University of Deusto, Bilbao, 2007.

[16] The Hague Recommendations regarding the Education Rights of National Minorities (1996); the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999); and the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note (2 October 2008).

[17] The only provision mentioning minorities can be found at Art. 14 of ECHR which prohibits discrimination on the ground of association, *inter alia,* with a national minority.

[18] See, *inter alia,* CoE. 2010. "Supervision of the Execution of Judgements of the European Court of Human Rights." Directorate General of Human Rights and Legal Affairs, Strasbourg; MEDDA-WINDISCHER, R., "The European Court of Human Rights and Minority

Moreover, as a result of the ethnic conflicts in the former Republic of Yugoslavia during the 1990s, the CoE has adopted a more effective strategy to protect the rights of minorities. Firstly, a commission of legal experts was created in order to deal with minorities and to better assist democratization processes in transition areas (Venice Commission).[19] Secondly, two specific instruments were created to protect and promote the rights of minorities: the 1992 European Charter for Regional or Minority Languages and the 1995 Framework Convention on the Rights of Persons Belonging to National Minorities.

The protection of minorities is also granted by two additional monitoring bodies in the geo-legal area of the CoE: the European Commission against Racism and Intolerance (ECRI) and the European Committee on Social Rights (ECSR). In particular, ECRI produces both in-country reports and general policy recommendations on racism, xenophobia, antisemitism and intolerance by working closely with the civil society.[20]

The ECSR is instead specialized in monitoring the conformity in law and in practice of States Parties with the provisions of the European Social Charter.[21] It considers national reports submitted by

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Rights" *European Integration*, n.º 25/2003, pp. 249-271; SANDLAND, R., "Developing a Jurisprudence of Difference: the Protection of the Human Rights of Travelling Peoples by the European Court of the Human Rights", *Human Rights Law Review*, n.º 8/2008, pp. 475-516.

[19] The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering, the commission has become an internationally recognized independent legal think-tank. See http://www.venice.coe.int

[20] ECRI was established in 1993 by the first Summit of Heads of State and Government of the member States of the Council of Europe. The decision of its establishment is contained in the Vienna Declaration which the Summit adopted on 9 October 1993. In the framework of its country- by-country monitoring, ECRI examines the situation concerning manifestations of racism and intolerance in each of the Council of Europe member States. The country-by-country monitoring deals with all member States on an equal footing and takes place in five-year cycles, covering nine/ten countries per year. In the framework of General Policy Recommendations ECRI addresses guidelines which policy-makers are invited to use when drawing up national strategies and policies in various areas (for instance on 24 June 2011 ECRI has adopted a General Policy Recommendation N.º 13 on Combating Anti-Gypsyism and Discrimination against Roma). Finally, ECRI performs a strong program of awareness-raising among the general public through the cooperation with s NGOs, the media, and the youth sector at the national level. See www.coe.int/ecri

[21] The European Social Charter was adopted in 1961 and revised in 1996. It enshrines socio and economic provisions focusing on the areas of housing, health, education, employment, legal and social protection, free movements of persons and non-discrimination. See also http://www.coe.int/T/DGHL/Monitoring/SocialCharter/

Member States on a yearly basis, and at the same time, it examines collective complaints from organizations representing groups of citizens who allege a breach of any provisions of the Social Charter.[22] In this respect, the ECSR has addressed Roman claims and majorly contributed to the definition of their collective right in State policies.[23]

c) The EU is the third and smallest organization (in terms of number of Member States) dealing with the respect of human and minority rights in Europe. Although it has been originally created and organized as a tool for economic integration, the EU has increasingly become concerned with individual human rights and then with minority rights by progressively including them in its mandate.

Indeed, the EC/EU legislation is mostly characterized by hard law instruments focusing more on the dimension of non-discrimination[24] than on the one of the promotion of minority rights.[25]

Until very recently, minority protection was not considered to be part of EU's competences and *acquis*. The notion of 'national minorities' started to

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[22] As for collective reports, the ECSR considered a number of reports submitted by NGOs representing minority groups. In the case of Roma, see, *inter alia,* Decision on the merits of 28 June 2011, Centre on Housing Rights and Evictions v. France, Complaint n.º 63/2010, which concerns the eviction and expulsion of Roma from their homes and from France during the summer of 2010. For a more comprehensive overview of the complaints involving minority groups see http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

[23] Specifically, the issue of adequate housing has been largely debated in ECSR case law. It is opportune to recall two major decisions, which resume the positions of ECSR. In European Roma Rights Centre (ERRC) v. Portugal, Complaint n. 61/2010, the Committee held that the Portuguese government discriminated against Roma citizens, by disregarding their cultural specificities in housing policies and so failing to change the reality of segregated settings for Roma residents. The ECSR has further consolidated its position on Roma rights in Centre on Housing Rights and Evictions (COHRE) v. France, Complaint n. 63/2010, which built upon the previous ruling on French Romani citizens' property eviction held in ERRC v. France, Complaint n. 51/2008. The Committee not only found that the evictions amounted to mass expulsion and failed to meet the basic requirements of necessity and adequate alternative resettling, but also ruled on the issue of discrimination. By interpreting art. E of the Charter, the Committee argues that State failure to adopt policies for providing citizens for adequate housing, or failing to enact them, also amounts to discrimination (see par. 29) – this position was explained in a previous decision ECCR v. Italy, Complaint n. 58/2009, par. 35.

[24] The Racial Equality Directive (2000/43/EC), the Employment Framework Directive (2000/78/EC) the Council Directive on Family Reunification (2000/86/EC) and the Long-Term resident Directive (2003/109/EC).

[25] When considering the minority legislation all along the three geo-legal spheres, it can be generally emphasized the aspect that minority legislation is more specific and far-reaching in soft-law instruments than in the hard-law ones (hence in the most external geo-legal boarders than in the most internal ones).

enter the EU's domain just in the 90s and exclusively with regard to external relations in the enlargement policies towards the Eastern part.[26]

After 2009 with the entry into force of the Lisbon Treaty, minority protection has acquired binding force. Article 2 in fact specifies:

> The Union is founded on the values of respect for human dignity, liberty, democracy, equality and the rule of law and respect for human rights, *including the rights of persons belonging to minorities* [emphasis added]. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Worded in these terms, this article defines minority rights as human rights, while traditionally considered excluded from that category for their collective dimension. Although this provision formulates minority rights more in terms of individual rights (as the wording 'persons' may suggest), it nonetheless opens for a broader interpretation including also collective rights, since members of minorities are inevitably part of a group and are therefore entitled to collective enjoyment of their rights as well.[27]

Moreover, since the Lisbon Treaty has made the Charter on Fundamental Rights legally enforceable,[28] minority rights provisions in the EU should therefore be interpreted also in the light of articles 21 and 22 of the Charter. Specifically, article 21 prohibits, *inter alia*, any discrimination on the ground of 'membership to national minority'. Article 22 commits the Union to the respect of 'cultural, religious and linguistic diversity'.

Although both provisions do not explicitly refer to the protection of minorities nor provide them with more specific legal entitlements, it might be argued that minority rights law in the EU does not only refer to national minorities but also to minorities other than 'national', which differ from the majority of the population for their 'cultural, religious and linguistic' features, as set forth in article 22.

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[26] From the adoption of the 'EC: Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' in 1991 to the Eastern European countries application for membership in 1993, Member States created a framework for EU enlargement (known as 'Copenhagen criteria') where the protection of minorities were firstly mentioned as a requirement to enter the Union.

[27] SHORAKA, K., *Human Rights and Minority Rights in the European Union*, ed. Routledge, Abingdon, 2010.

[28] Art. 6.1 of the Lisbon Treaty provides the Charter with the same status as the EU Treaties: 'The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights in the European Union of 7 December 2000, as adapted in Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

This broader interpretation of minority rights protection under EU law could also be considered in future in the realm of institutional redress of individual and community rights before the European Court of Justice (ECJ).

To date, the ECJ has already pronounced itself on three cases concerning minority rights, all of which mostly involved linguistic rights issues: the *Mutsch* case[29] of 1985, the *Groener* case[30] of 1989 and the *Bickel/Franz* case[31] of 1998.

Nonetheless, it is interesting to remind that the Lisbon treaty, besides extending ECJ's jurisdiction over a wider legal basis, has also opened up the opportunity for the EU to enter ECHR as a party, by recognizing the legal personality of the organization.[32]

Should the EU agree to join the ECHR, the jurisdiction of the two courts, the ECJ and the ECtHR, over the breaches of EU-ECHR human and minority rights need to be precisely defined, in order to avoid potential conflicts between the two *fora*. According to some scholars, the accession of the EU to the ECHR could be thought just as 'complementary' to the ECJ, since all EU Member States are already part to the ECHR.[33] Others support the view that by adhering to the ECHR, the EU would certainly strengthen human and minority rights protection within its boundaries because it would adopt the ECHR common standard of protection.

Indeed, human and minority rights are not part of ECJ's primary competence, as in the case of the ECtHR, which relies on the compliance to the EU law mostly reflecting economic integration goals. Hence, the adherence to ECHR could potentially ensure more coherence and harmony between the two institutions.[34]

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[29] *Mutsch*, Reference for a preliminary ruling, Case 137/84 [1985] ECR 2681. In this case the Court held that the equal treatment of migrants has to be granted also by allowing them to use their language in proceeding before the courts as a way to meaningfully contribute to their integration.

[30] *Groener v. Minister for Education and the City of Dublin,* Case C-379/87 [1989] ECR 3967. In this case, the Court states that the requirement of bilingualism is reasonable to protect a minority language.

[31] *Bickel/Franz,* Reference for a Preliminary Ruling, Case C-274/96 [1998] ECR I-7637. In this case, the Court similarly rules for the right of linguistic minorities to use their foreign languages in judicial and administrative procedures.

[32] On the problems connected to the lack of legal personality of the EU before the entry into force of the Lisbon Treaty, see, *inter alia,* DE SCHOUTHEETE, P., ANDOURA, S.,"The Legal Personality of the European Union", *Studia Diplomatica* n.°60, 2007, pp. 1-9.

[33] As Shoraka clarifies: 'the EU's accession to the ECHR can be seen as complementary, just like Member States have their own constitutions and bill of rights and at the same time have submitted themselves to external control by international organisations such as the CoE. SHORAKA, *op. cit.*, pp. 50-51.

[34] *Ibid.*, p. 51.

Despite this possible future convergence between EU and CoE judicial bodies, it has to be stressed that among the three European organizations which include the protection of human and minority rights in their mandates, the EU is the one playing the most crucial role since through its hard-law instruments it can impose a more incisive compliance to international human and minority rights standards to Member States.

Yet, over the last decades, the EU benefited of the work and the experience of the CoE and OSCE especially during the enlargement process, thanks to fruitful synergies among the three organizations in the field of minority rights.[35]

This intensification of human and minority rights protection has reinforced the view that Europe is the geo-political region that most intensively protects the rights of minorities in the world (Nowak, 2003). Despite these positive legal improvements, its web of protection still presents some serious gaps, characterized by a common territorial basis on which minority rights hinge. As a result, every social group that cannot be exactly comprised within a given territory cannot fully benefit from the protection granted by these legal instruments.

III. Nation = State? The cases of new minorities and traditional non-territorial minorities

The legal loopholes highlighted on the theoretical level in the previous section emerge quite visibly on the practical level in the cases of migrants and Roma.

In the last years, the number of legal instruments dedicated to migrants has notably increased.[36] Legislators have progressively created specific instruments according to the diverse categories and needs of migrants, including economic migrants, asylum seekers, and refugees.[37]

The rational underlying legal instruments designed for migrants relates to "temporary" forms of protection suitable either for people that have just entered the European territory or for people temporarily residing in it. However, there are some migrants that, for diverse reasons, decide to reside for a

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[35] On the relationships between EU and CoE and EU and OSCE, especially with the Fundamental Rights Agency (FRA) and the HCNM, see SHORAKA, K., *op. cit.*, pp. 84-89.

[36] For an overview over the European legal instruments dealing with the protection of migrants see BOELES, P., DEN HEIJER, M. and LODDER G., *European Migration Law*, ed. Intersentia, Mortsel, 2009.

[37] A more specific distinction can be drawn by considering whether the migrant is an adult or a child, a child accompanied by an adult or unaccompanied, and if he/she has a relative already resident in Europe. To all these diverse social situations, different legal protection is granted.

longer time or permanently in a country other than the one of birth. Hence, these people are not fully protected by the above-mentioned legal instruments. Especially social groups of migrants that have reached, in terms of number and time of residence a significant presence within European States are defined in the literature as "new minorities." Among these social groups, there are some that claim to be legally treated as "old minorities," i.e. as historical, traditional, and autochthonous groups, in order to benefit from a more intense degree of protection.[38]

Although it is not possible to draw a clear line dividing the categories of "old" and "new" minorities,[39] a theoretical distinction, though not completely satisfactory, can be drawn in terms of the different set of rights that are recognized to each legal category. In general terms, "old minorities" are recognized through a set of rights mostly related to the protection of the religious, linguistic, and cultural sphere, whereas "new minorities" are generally recognized through a set of rights mostly related to the socio-economic sphere.[40] Another general distinction between these two categories is drawn, both in literature and in state practice, on the basis of the "historical tie" with a traditional area of settlement.

In the beginning of the 90's, these conditions have been insistently promoted in view of the adoption of a formal definition within the Council of Europe by countries that feared the claims of new minorities to a similar standard of cultural and political rights.[41]

Today we still lack a formal definition by the CoE or any other international organization, hence it is still unclear which legal requirements a minority should present to be recognized as "historically tied" with a certain area. How many years should have passed in order for a minority settlement to be recognized as "historical"? Who is entitled to provide such recognition? No one is currently able to provide adequate answers to these questions.

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[38] To the latter category in fact belong those social groups that have been traditionally living within a certain territory and that have become minorities as a consequence of a re-drawing of international borders (such as the German speaking minority living in Alto-Adige/Südtirol, Italy).

[39] EIDE, A., "The Right of "Old" versus "New" Minorities." *European Yearbook of Minority Issues* vol. 2 (2002/2003), ed. Martinus Nijhoff Publishers, Leiden, 2004, pp. 365-380.

[40] This is just a general distinction that has been drawn here for the sake of simplicity. Indeed, the guarantees granted to each and every social group change according to the national recognition. Accordingly one of the most debatable set of rights relates to the representation in the public sphere which stands in a "borderline position" between "old" and "new" minorities.

[41] TANASE, I., *Defining National Minorities*, St. Antony College, University of Oxford, 2003, online publication available at http://www.sant.ox.ac.uk/esc/esc-lectures/Tanase.htm (last consulted on 21 February 2011).

Yet, this is not the point. The point is, again, that in order for a social group to be entitled to the full recognition of its individual and collective rights, it has to meet the requirements of the Westphalian territorial model.

The same issue arises, though to a higher degree of complexity, with regard to the largest traditional non-territorial minority in Europe: Roma. On the one hand, their historical presence in Europe[42] can constitute a reasonable basis to protect them by mean of the legal instruments designed for "traditional and autochthonous" minorities, on the other hand their nomadic lifestyle can find more adequate protection by means of those legal tools that have been designed for migrants. In the lack of clarity concerning the belonging to one category or another, the majority of them are living in a legal limbo, which recognizes neither their belonging to the legal category of "historical, autochthonous minority" nor their belonging to the category of "new minorities".

Because of their traditional nomadic lifestyle, they "naturally" escape geographical and legal boarders, hence the coexistence of people holding different citizenship status is not unusual within Romani communities: European, non-European, stateless people and even unregistered people who are completely invisible to the law.

As international and European levels, national systems also have difficulties in adapting the existing legal categories to the needs of Roma. "Linguistic belonging" is also an issue: some of them speak *Romanes*, others speak the language of the State where they live. Thus, the category of "linguistic minority" (which has been the most developed legal category in the realm of "old minority") also does not work to comprehensively embrace this heterogeneous group.

Hence, the only way to overcome these legal discrepancies which result in a partial enjoyment of human and minority rights for certain social groups (especially migrants and Roma) is to release minorities from the "nationalist trap".

IV. A Step forward and a look backward: reconsidering Karl Renner's model

European States are becoming increasingly multi-cultural and multi-ethnic due to migration and supra-national institutions that affect not only States and their capacity to provide services and allocate resources, but

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[42] Linguistics have demonstrated that Roma descends from North Indian castes and arrived in Europe between the 500 and the 1000 A.D. See, *inter alia*, FRASER, A.M., *The Gypses*, Blackwell, Oxford, 1995.

also their societies and their cultural, ethnic, and national features. The nation-State model is based on "territorialized cultural belonging" and on the "[control of] legal membership,"[43] but economic and social developments progressively challenge the modern State's ability to maintain its traditional role in a context of cultural homogeneity.[44] The claims of non-territorial minorities are to be conceived in the phenomenon of "blurring national borders," and turn to define the contemporary "minority question" (*Minderheitsfrage*) within the global change of the nation-State model.[45]

Minority claims in a multi-cultural and —ethnic context are not typically post-modern—; indeed, the same question arose within multi-national Empires in the 18th and 19th centuries. Specifically, the Austrian-Hungarian Empire tackled with the need to re-conceptualize the role of the State vis-à-vis national communities' demands for autonomy. A revolutionary idea was introduced in the Hapsburg Empire, which already conceded large autonomy to the Hungarian regions in both religious and cultural matters: the proposal for introducing a cultural autonomy system was advanced by Karl Renner and Otto Bauer, who believed in cultural democratization in an Austro-Marxist perspective.[46]

According to Karl Renner, territory was an endless source of conflict for minority claims; therefore, communities should be defined in terms of cultural and personal membership, in order to nullify the negative potential of territory in groups' claims. Indeed, "in its pure form, the territorial principle… is the cruel and most inappropriate solution" because "the conflagration is localized, but not extinguished."[47] This analysis focused on practical evidence: after territorial autonomy was conceded to Hungarians, other national groups demanded territorial control, triggering an escalation of demands that could not be solved through "federalization." The territorial division of the Empire into ethnically homogenous regions was indeed an illusion, since each region would create new minority groups, which were dominant in on other region, and would disregard the needs of those groups

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[43] MORRIS, L., "Globalization, Migration and the Nation-State", *The British Journal of Sociology*, n.º 8/2, 1997, pp. 192-209, at 194.

[44] ROBERTSON, R., *Globalisation*, ed. SAGE, London, 1992.

[45] FELDMAN, G., "Development in Theory: Essential Crises: A Performative Approach to Migrants, Minorities, and the European Nation-State", *Anthropological Quarterly*, n.º 1/78, 2005, pp. 213-246.

[46] BAUER, O., *The Question of Nationalities and Social Democracy*. Efraim NIMNI (ed.), University of Minnesota Press, Minneapolis, 2000; translated by Joseph O'Donnell from the original *Die Nationalitätenfrage und die Sozialdemokratie*, ed. Volksbuchhandlung, Vienna, 1924).

[47] RENNER, K., "State and Nation", in: NIMNI, E. (ed.), *National Cultural Autonomy and its Contemporary Critics*, ed. Routledge, New York, 2005, pp. 15-47 at 32.

that were not territorially definable. Therefore, "if one wants to solve the nationalities question, one must focus on the nations! One must liberate them from political constellations, from the necessity of political barter, from feudal and clerical influences."[48]

The model of constitutional engineering proposed by Renner was designed to manage national diversity through a "dual federalist" system whereby the central power of the states has to be devolved both on a territorial and on a non-territorial basis.[49] The territorial model, which was designed to solve the Austro-Hungarian Empire's internal conflicts, maintains the system of territorial devolution of power in *Länder* (Crown Lands and Provinces) with respect to administrative tasks. At the same time, the devolution of power is also devolved on a non-territorial basis to *Nationalrät* (national councils), which are institutions that represent national groups, with competence in areas such as education, culture, art and science. As John Coakley clarifies

> Renner's project was based on the administrative units into which each province was divided: each uninational county *(Kreis)* would return three deputies to the appropriate national council, while binational counties would return two deputies to the national council of the local majority and one to that of the local minority. The jurisdiction of each national council would be non-territorial: it would extend to all persons in uninational counties or the nation in question and to persons registered as belonging to that nation in binational counties.[50]

This model, which is known as national cultural autonomy, combines both territorial and non-territorial devices, in order to guarantee citizens' rights through a sort of competence repartition. The traditional goals of the State, including allocation of resources and security, are pursued through "federalization," so that citizens, irrespectively of their residence and national affiliation, are guaranteed economic, political, and social rights. On the contrary, national institutions provide for cultural and educational services, so that national and ethnic groups are guaranteed autonomy for preserving their cultural heritage.

Bauer, a social democrat, who focused on the empowerment of the international worker movement, also advocated the model of cultural autonomy. Specifically, he worked for the constitutional recognition of corporate bodies

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[48] *Ibid.*, p. 31.
[49] COAKLEY, J., "Approaches to Resolution of Ethnic Conflict: The Strategy of Non-Territorial Authonomy" in *International Political Science Review*, n.º15/3, 1994, pp. 297-314 at 300.
[50] *Ibid.*

consisting of representative councils, educational boards, and labor unions.[51] In spite of the different premises, Bauer shares with Renner the idea that "granting the same cultural rights for all was a way of achieving national autonomy as this would eliminate the differences between and among groups while at the same time preserving the differences of these groups."[52]

Although no reform was introduced in the Austro-Hungarian Empire in this sense, the national cultural autonomy model has been analyzed in both political and legal literatures as an effective model for managing diversity.[53] Comparatively, this model can be analyzed in light of other instruments that have been adopted in similar historical contexts for accommodating groups' demands; specifically, the Ottoman experience of the *millet* can be considered the most comprehensive implementation of theoretical models regarding non-territorial autonomy for national groups. Although no specific study has focused on this point, one may presume that the Ottoman experience was not unknown to Renner and Bauer, who may have drawn inspiration from the Balkan territories that the Austro-Hungarian Empire acquired from the Ottomans—indeed, Renner's model is always analyzed with reference to the millet system, though no historical study has yet demonstrated that Renner and Bauer actually studied the millet.[54]

V. **From East to West: the millet *system* for national, cultural, and personal autonomy.**

The millet system is defined as a

> very controversial technique of differential promotion of groups that makes legal systems which adopt it resemble multinational systems (in that it stably institutionalizes groups), although they structurally distin-

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[51] ROACH, S.C., *Cultural Autonomy, Minority Rights and Globalization*, ed. Ashgate, Aldershot, 2005, p. 52.

[52] *Ibid.*, p. 43.

[53] KEATING, M., "Territory, State and Nation in the European Union: How Relevant is Renner?", in: NIMNI, E. (ed.), *op. cit.*, pp. 181-190; KLÍMOVÁ-ALEXANDER, I., *The Romani Voice in World Politics: The United Nations and Non-State Actors*, ed. Ashgate, Aldershot, 2005; KYMLICKA, W., "Renner and the Accomodation of sub-state nationalisms", in: NIMNI, E., *op. cit.*, pp. 137-149.

[54] HORVÁTH, E., *Mandating Identity: Citizenship, Kinship, Law and Plural Nationalities in the European Union*, ed. Kluwer Law Inetrnational, Leiden 2008; NIMNI, E., "National Autnomy", in LEOUSSI, A. *Encyclopaedia of Nationalism* ed. Transactions Pulisher, New Brunswick, NJ, 2001, pp. 210-214; MENTZEL, P., "Karl Renner's Ideas on Personal Autonomy", in: RAMET, S.P.; FELAK, J.R. and ELLISON H.J., *Nation and Nationalism in Eastern-Central Europe,1806-1848: A Memorial to Peter F. Sugar*, Slavica, Bloomington, 2002, pp. 79-91.

guish themselves from these, in that the institutionalization is limited to certain purposes. It is the creation of a system of "pillars" that provides for separated and, ultimately, self-governed communities for different groups, in sectors such as education or personal status.[55]

This system is the Ottoman institutionalization of the Islamic institute "dhimma," which regulates the legal status of the non-Muslim under Islamic rule,[56] whereby non-Muslim monotheistic communities are guaranteed autonomy and protection in return for the payment of a tax called *jizya*. Ottoman institutions developed the *dhimma* regime in order to manage ethnic and religious diversity in the extensive territories under the rule of the Sublime Porte. Individual identity was defined in terms of religion, whereby Ottoman citizens were subject to the jurisdiction of their respective religious group, so that "each group constituted a *millet* within the empire" and "membership in the *millet* automatically followed lines of religious allegiance."[57]

Major reforms were introduced in the 19th century, the so called Tanzimat era, and aimed to bring equality among Ottoman citizens, irrespective of their religion, by creating a new pole of loyalty that would attract and fuse the different identities, so far separated, into a new concept of nationhood, which was known as Osmanlılık, "Ottomanism."[58]

The late Ottoman millet was a constitutional system that guaranteed autonomy to ethno-religious groups in terms of personal autonomy, cultural autonomy, and political representations; each recognized ethno-religious group was entitled to legal autonomy, whereby individuals were subject to the legal system of the group they belonged to; moreover, each group was entitled to run educational, health, and charity institutions while political representation was guaranteed at both local and national levels.[59] Although the 19th century reforms signaled the collapse of the Empire under nationalist pressures, the same three branches of autonomy were maintained in modern Middle-East legal systems that have adopted the millet.

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[55] PALERMO, F. and WOELK J., *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, ed. CEDAM, Padova, 2008, p. 52.

[56] YE'OR, B., KOCHAN, M., and LITTMAN, D., *The Decline of Eastern Christianity Under Islam—From Jihad to Dhimmitude*, ed. Fairleigh Dickinson University Press, Cranbury NJ, 1996, p. 98.

[57] DAVISON, R.H., *Reform in The Ottoman Empire 1856-1876*, Princeton University Press, Princeton, 1963, p. 13.

[58] GAWRYCH, G.W., *The Crescent and the Eagle—Ottoman Rule, Islam, and the Albanians 1874-1913*, I.B. Tauris, London, 2006, p. 16.

[59] QUER, G.M., "Pluralismo e diritti delle minoranze: il sistema del 'millet'", *Quaderni di Diritto e Politica Ecclesiastica*, vol. 18/1, 2010, pp. 257-284.

With respect to personal autonomy, several contemporary legal systems in Near and Middle East, including Israel, Lebanon, Jordan, Syria, and Iraq, grant autonomy to religious communities, which regulate the personal status of their members according to each group's legal tradition. Therefore, marriage and divorce, as well as other matters of family law, fall within the jurisdiction of religious courts. Two main criticisms are formulated against such systems. First, contemporary systems, by guaranteeing extensive autonomy to religious courts, legitimize the perpetuation of cultural and traditional practices that are contrary to fundamental rights. Indeed, these legal systems, when the application of religious law is not adequately controlled, recognize even "internal restrictions" defined as "powers wielded by a group to maintain unchanged its customs and practices," in order to "prevent members from adopting other cultural features or leaving the group."[60] Secondly, personal autonomy challenges the cohesion of the entire legal system of a State, because the coexistence of different laws and legal traditions may create not only legal antinomies but also political conflicts in terms of values protected by the law.[61]

With respect to cultural autonomy, in contemporary millet systems, recognized groups are entitled to run educational, cultural and charity institutions, whereby they are guaranteed cultural and linguistic rights. In certain countries, such as in Lebanon, such autonomy is so extensive that communities live separate lives with the negative effect that it exacerbates particular differences thus impedes a general identity from being developed.[62]

With respect to political representation, arrangements that take into account ethnic affiliation are criticized on the ground of stability and sustainability, although they may serve the purpose to contain ethnic conflict if representation devices are limited in time or flexible.[63] Lebanon is often cited as an example of instability due to its power-sharing arrangements known as confessionalism." In Lebanon, public posts and powers are divided among the different communities according to a model introduced by the French Mandate, which was designed to guarantee peaceful coexistence by granting to each group not only political participation but also a portion of

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[60] KYMLICKA, W., *Multicultural Citizenship*, ed. Clarendon Press, Oxford, 1995, p. 35.

[61] SBAI, S., *L'Inganno—Vittime del Multiculturalismo*, Cantagalli, Siena, 2010, pp. 89-91.

[62] TIBI, B., *Islamische Zuwanderung—Gescheiete Integration*, Deutsche Verlags-Anstalt, München, 2002, pp. 178-181.

[63] WOLFF, S., "Complex Autonomy Arrangements in Western Europe: A Comparative Analysis of Consociationalism in Brussels, Northern Ireland and South Tyrol", in: WELLER, M. and WOLFF, S. (eds.), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*, Routledge, Oxon, 2008, pp. 118-119; LIJPHART, A., *Democracy in Plural Societies*, Yale University Press, New Haven, 1997, pp. 81-83.

power.[64] According to Edmond Rabbath, political instability in Lebanon is due to a "pathologic development from political confessionalism" originating from "the communitarian regime, to a form of metastasis that has overrun mentalities and institutions."[65]

Notwithstanding these valid counter-arguments, the millet system still represents a model for managing complex diversity in terms of non-territorial autonomy toward which several European countries are shifting. Although the progressive adoption of non-territorial instruments for protecting minorities is not a conscious adaptation of the millet system, several European states seem to look eastwards and a European version of the *millet* system seems be emerging.[66]

The presence of migrant communities with radically different traditions have increasingly challenged the capacity of European States to maintain a homogenous ruling legal system over cultural practices ensuing from, for instance, Islamic law. It is the case of Muslim minorities in several European countries, which demand recognition of Islamic institutions such as polygamy.[67] As has been pointed out, non-recognition of foreign legal traditions does not assure the consequent compliance of minorities to the principles and values of the ruling legal order; on the contrary,

> ethnic minorities have not remained passive recipients of official dictates. Rather, there is evidence of their reliance on their own cultural resources to secure acceptable outcomes for themselves, and they are often able to negotiate between different legal levels in order to do so, thereby calling into question the claims about the dominance of the official legal system.[68]

Moreover, the risk that non-recognizing States run is to lose effective control over the application of traditional rules, and consequently failing to

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[64] GORDON, D.C., *Lebanon: a Nation in Jeopardy*, Croom Helm, Beckenham, 1983, p. 20.

[65] RABBATH, E., *La Constitution Libanaise—Origines, Textes et Commentaires*, Publications de l'Université Libanaise, Beirut, 1982, p. 517.

[66] QUER, G.M., "Un Millet per l'Europa: il modello pluralista nella gestione della diversità religiosa", in *Veritas et Jus*, n.º 1/1, 2011, pp. 43-65.

[67] Other demands of religious rights, including religious slaughter rituals and the veil, are more connected to political issues. Indeed, many allegedly legal problems originating from Islamic minorities demands, such as the building of mosque or the burqa issue, are more connected to the perception that Europeans and Westerns have of Muslims, exacerbated by often ideologized views of 11/9, terrorism, the cartoon issues etc. Therefore, we will not focus on the broad issues related to new minorities, but to those that constitute major challenges to the legal system and *ordre public*.

[68] SHAH, P.A., "Attitudes to Polygamy in English Law", in: *International and Comparative Law Quarterly*, vol. 52/2, 2003, pp. 369-400 at 398.

guarantee the minimum respect of fundamental rights[69]. For these reasons, the UK has recently recognized Islamic law courts as arbitration courts in matters of family law, the decisions of which are to be scrutinized by British courts for ascertaining the compatibility with fundamental rights. This is the first case of "breach" of the monolithic legal order, by introducing a foreign legal system that operates, however, at the arbitration level; in other words, this constitutes the first modern case of personal autonomy in Europe.[70]

Estonia[71] and Hungary[72] have introduced systems of cultural autonomy that guarantee cultural collective rights to ethnic minorities, which enjoy self-government and representation rights at the national level.[73] Specifically, in Hungary, minorities enjoy representation at the local level, while minority representative institutions participate in the local legislative process with respect to issues of interest to the minority, including cultural heritage, use of language, toponomy, and educational curricula.[74] These two

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[69] *Ibid*.

[70] Another case of personal autonomy indeed exists, for Thracian Muslims in Greece, and originates from the agreement between Greece and Turkey of the 1920s. However, these arrangements are directly connected to the Ottoman millet, and are applied only to the historical Muslim community in Thrace. See, TSISTSELIKIS, K., "Personal Status of Greece's Muslims: A Legal Anachronism or an Example of Applied Multiculturalism?", in: ALUFFI, R. and ZINCONE, G. (eds.), *The Legal Treatment of Islamic Minorities in Europe*, Peeters, Leuvent, 2004, p. 117.

[71] See, the Law on Cultural Autonomy for National Minorities, 28 November 1993, available at http://www.unhcr.org/refworld/category,LEGAL,,,EST,3ae6b51810,0.html

[72] See art. XXVIII of the Hungarian Fundamental Law, according to which nationalities and ethnic groups may set up local and national self-governments (par. 2).

[73] SUKSI, M. (ed.), *Autonomy: Applications and Implications*, Kluwer, The Hague, 1998; WALSH, N., "Minority Self-Government in Hungary: Legislation and Practice", in *Journal of Ethnopolitics and Minority Issues in Europe*; ECMI working-paper n.º 1/2000, available on-line at http://ecmi.de/jemie/

[74] *Ibid*., par. 1. However, with the entry into force of the new constitution in January 2012, the main institution that has guaranteed and promoted the rights of minorities, the Ombudsman, has been abolished. Indeed, the Parliamentary Commissioner for the Rights of National and Ethnic Minorities was a particularly incisive institution, which used to represent Hungary's different minorities in the Parliament. In February 2011, the Ombudsman issued a statement warning about the potential backlash in minority protection consequent to the constitutional revision. Specifically, the statement condemned the cut in the budget of local self-government bodies and the abrogation of the ombudsman. See, ERNŐ K., Parliamentary Commissioner for the Rights of National and Ethnic Minorities, *Statement on the Preservation of Minority Rights in Hungary*, 11 March 2011, available at the Ombudsman internet site, http://www.kisebbsegiombudsman.hu/hir-593-statement-on-the-preservation-of.html. Moreover, the European Parliament adopted on 5 July 2011 resolution RC-B7-0379/2011, in which it expresses concerns on the compatibility of the new constitution with the Charter and asks for effective protection of minority rights (point g in particular), see http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN.

recent examples confirm the progressive shift toward non-territorial autonomy, which at least two European systems had already adopted after the Second World War.

The Netherlands adopted a system called *verzuiling*, or pillarization, which represents the institutionalization of pluralism for every aspect of life. Educational services, media, labor unions, and political parties identified with one pillar, Protestant, Catholic, or Secular by creating separate social blocs under the control of each pillar's elite.[75] Eventually, this system was dismantled by the constitutional reform in 1983. In Belgium, however, a similar system is still in force, where three linguistic communities are recognized, the French, the Flemish, and the German, that are represented by institutions that wield power on cultural, educational, and personal issues. The sustainability of this system has been questioned with reference to the on-going non-violent conflict among the communities that exacerbates economic and social differences.[76]

Notwithstanding the arguments against the millet system and other specific instruments of non-territorial autonomy, there is a European trend that shows preference for non-territorial autonomy. Therefore, the question is why European countries show an interest for non-territorial autonomy? Furthermore, does Europe need a model of non-territorial autonomy?

VI. **For a European *millet*: beyond the nation-state, a Europe of States and *demoi***

The political theorist Hannah Arendt highlighted that the existence of stateless people is a modern political phenomenon created by the shifting of borders and States' denial to accommodate the claims of those minorities that could not ask a kin-state for protection.[77] Those peoples who fall outside the national, ethnic, or cultural identification of the state were not regarded as citizens but as persons without political dimension (indeed, 'stateless' in Greek is *a-polides*, person without *polis*, conceived not only as state but, more broadly, as political community). If one could argue that

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[75] VAN DOORN, J.A.A., "Verzuiling een eigentijds systeem van sociale controle", in: *Sociologische Gids*, n.º 3/1, pp. 41-49, 1956; RANDERAAD, N., "Het geplooide land", in: BLOM, J.C.H. and TALSMA, J. (eds.), *De verzuiling voorbij—Godsdienst, stand en natie in de lange negentiende eeuw*, Spinhuis, Amsterdam, 2000, pp. 135-150.

[76] MNOOKIN, R. and VERBEKE, A., "Persistent Nonviolent Conflict with no Reconciliation: the Flemish and Walloons in Belgium", in: *Law and Contemporary Problems*, n.º 72/1, 2009 pp. 151-186.

[77] ARENDT, H., *The Origins of Totalitarianism*, 3rd ed. Harcourt, New York, 1968, pp. 295-297.

in Europe the rule-of-law has overcome direct discrimination and denial of rights to entire communities through constitutional non-discrimination, still the collective dimension of rights is denied to those groups that do not fit in the territorial models. Therefore, non-territorial communities, including new minorities, the Roma, and, to a certain extent, even sexual minorities, are to be considered "neglected communities." One the one hand, individuals enjoy protection from anti-discrimination law, but on the other, the full enjoyment of cultural and religious rights, *per se* collective in nature, is denied to those categories which cannot find suitable citizenship in the nation-state model.

Hannah Arendt wisely observed that the question of the Jewish people as well as the one of other minorities, which she referred to as "small peoples," could be solved in a European Commonwealth. Since

> the notion that nations are constituted by settlement within borders and are protected by their territory is undergoing a crucial correction… there may soon come a time when the idea of belonging to a territory is replaced by the idea of belonging to a commonwealth of nations whose politics are determined solely by the commonwealth as a whole. That means European politics—while at the same time all nationalities are maintained.[78]

This still holds true for the above-mentioned groups that do not find appropriate accommodation in territorial autonomy. Islamic communities, Roma people, and to a certain extent even LGBT (Lesbian, Gay, Bi-, and Transsexual) groups cannot be fully considered European citizens when some States recognize and protect these minorities while other states do not. The situation is such that in UK, Islamic law is recognized in arbitration courts and limitedly applied, while in the rest of Europe Islamic communities do not have this opportunity. Roma people could theoretically enjoy collective rights in Hungary through the system of minority councils, while in the rest of Europe they are denied cultural and linguistic rights.[79] LGBT groups enjoy family or quasi-family rights in some European countries, while in others they are denied recognition. What then about a LGBT couple that has married in Sweden and is resident in Greece? What about Roma individuals of Italian citizenship? What about Islamic Britons resi-

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[78] ARENDT, H., "The Minority Question", in: KOHN, J. and FELDMAN, R.H. (eds.), *The Jewish Writings—Hannah Arendt*, Schocken, New York, 2007, pp. 129-130.

[79] As previously emphasized, see note n. 14, the recent constitutional revision and the policy of the current government in Hungary were harshly criticized for the ineffective implementation of minority protection instruments.

dent outside the UK that have contracted marriage according to Islamic law recognized by the British legal system?

These situations challenge the capacity of the EU to create a real free space where individuals, goods, services, capital, and judicial decisions not only circulate but also live in a structured "*Gesellschaft.*" Beyond the five European freedoms, the EU has progressively adopted instruments to protect human rights,[80] reflected in the jurisprudence of the ECJ.[81] However, real enjoyment of rights is reserved to those who belong to a nationality with a State or to a national or ethnic group entitled to territorial protection. States' interconnectedness has so progressed that solutions at the national level to accommodate non-territorial minorities' demands would be inappropriate. Hence, what is still missing is the adoption of a common approach in order to build a Europe not only of individuals and States, but also of peoples, including those peoples that are not territorially defined.

The adoption of the Lisbon Treaty represents a significant step toward this direction. First, the EU has now legal personality and thus constitutes a common institution for states, sub-national bodies, and peoples; secondly, the increasing focus on human rights strengthens the people-rights-approach rather than the market-rights-approach. Indeed, by including human rights and minority rights into its mandate and by considering them a fundamental part of its *acquis*, the European Union shifts from a mere organizational structure, where states count, toward a state-like structure in which individuals, citizens, people count. Hence, the focus of the EU mandate is not only the market but also the fundamental rights of its citizens.

In Arendt's terms, the creation of a European supra-national institution would solve the problems of minorities by dealing with "politics," while national groups would maintain their distinct features within the states with no need to merge and level down their ethnic, cultural, and linguistic specificities. Indeed, it is not far from Renner's model and not far from reality, but a further step is needed.

In Renner's model, the State provides services for citizens and allocates resources through a federalized system of control, while national councils provide communal educational and cultural services for specified groups. Europe has achieved a level of integration that member states are progressively reducing their sovereignty through harmonization and unification of national policies and legal systems. In this sense, it is comparable to both

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[80] DI FEDERICO, G., *The EU Charter of Fundamental Rights—From Declaration to Binding Instrument*, Springer, London, 2011.

[81] CRAIG, P. and DE BÚRCA, G., *EU Law—Texts, Cases, Materials*. 4th ed. Oxford University Press, Oxford, 2008, pp. 379-427; DOUGLASS-SCOTT, S., *Constitutional Law of the European Union*, ed. Pearson Education, Harlow, 2002, pp. 437-450.

the state of Renner's model and to the Commonwealth of Arendt's model. As a consequence, it is foreseeable that a model of *Nationalitätenräte*, which deal with cultural and educational issues under national and European supervision will be built. By so doing, Europe would adopt a model of national cultural autonomy, in Renner's term, or a *millet*, in contemporary terms, whereby groups are entitled to autonomy and can self-govern their activities in certain areas with bodies of representation to effectively advance their interests. From this idea, two remarkable considerations follow, which concern first the role of the State, and secondly the shape of Europe.

In this "European Commonwealth" that decides "politics," allocates resources, and provides for services, the re-organization of state polity is inevitable. Indeed, the process of empowerment of regions and decline of the state as the major international actor is an on-going process at both the European regional level[82] and the international.[83] Although the State may remain the first actor that enacts policies and implement regulations, its role even in the realm of minority protection is designed to decrease. The existence of several geo-legal spheres regarding minority rights shows that States are not primarily involved in the definitions of standards and policies.

At the European level, the CoE has also taken major steps toward the definition of a common understanding of minority protection through the adoption of the Framework Convention on Protection of National Minorities, the European Charter for Regional or Minority Languages, and CoE Recommendation 1735 (2006). Specifically, Recommendation 1735 calls upon states to protect national minorities, ratifying the abovementioned conventions, and abstaining from discriminating against minority groups. The convention focuses on national minorities and repeatedly refers to territorial autonomy as a valid instrument to protect minorities; however, article 16.4 "invites the member states… to integrate all its citizens, irrespective of their ethno-cultural background, within a civic and multicultural entity."

The process of integration of diverse citizens is what Will Kymlicka calls 'citizenization' in liberal multiculturalist perspective,[84] which is slowly including non-territorial minorities. The further step toward appro-

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[82] LOUGHLIN, J., "Europe of the Regions" and the Federalization of Europe", in: *Publius*, n.º 26/4, 1996, pp. 141-162; MORRIS, L., "Globalization, Migration and the Nation-State", in: *The British Journal of Sociology*, n.º 48/2, 1997, pp. 192-209.

[83] STRANGE, S., *The Retreat of the State—The Diffusion of Power in World Economy*, Cambridge University Press, Cambridge, 1996; VAN CREVELD, M., *The Rise and Decline of the State*, Cambridge University Press, Cambridge, 2010.

[84] KYMLICKA, W., *Multicultural Odysseys—Navigating the New International Politics of Diversity* (Oxford: Oxford University Press), 2007, p. 96.

priate inclusion of all European citizens would be the recognition, in terms of politics of recognition,[85] of those peoples that have so far been excluded from collective protection, including the Roma, religious minorities, and, to a certain extent gender minorities as well, through a common European approach that clearly defines identity politics.[86]

In a European model of non-territorial protection, the role of the state would not be the main guarantor of protection, but rather the coordinator of regional implementation policies. Indeed, as in Hungary and in Renner's model, minority councils locally implement policies decided at the central level. Given the relevance of non-territorial minorities at the overall European level because of their statelessness and their existence across borders, the most appropriate level for defining a policy is the European one, while states would coordinate local-regional implementations. The inclusion of citizens at the margins of Europe implies not only a change in terms of states' role, but also in terms of the state's nature.

CoE Recommendation 1735 "invites the member states… to stop defining and organizing themselves as exclusively ethnic or exclusively civic states" (art. 16.4). The wording of the document, although mild, calls upon states to consider themselves no longer as the institutional product of the political efforts of one people. Indeed, the nation-state is the homeland in political terms, and the guardian, in cultural terms, of one group that shares the same linguistic, ethnic, cultural, and often religious features. However, the inclusion of non-territorial communities would be a significant challenge to the foundations on which the state has historically developed as an essentially national polity. As article 7 of Recommendation 1735 emphasizes,

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[85] GUTMAN, A. and TAYLOR C., *Multiculturalism—Examining the Politics of Recognition*, Princeton: Princeton University Press, Princeton, 1994.

[86] ANDERSEN, J. and SIIM, B., *The Politics of Inclusion and Empowerment—Gender, Class and Citizenship*, Palgrave, New York, 2004. In this respect, the document approved by the European Commission on the national strategies for integrating Roma people constitutes a remarkable example of supranational framework to which member states shall refer in the adoption of local policies. Indeed, the "EU Framework for National Roma Integration Strategies", adopted by the Commission Communication COM(2011)173 on 5 April 2011, sets forth general goals, including access to education, health, employment, and housing, which are to be achieved by member states in the adoption of national policies. The framework also calls for a strong commitment of member states in integrating Roma people and suggests potential implementation methods, including monitoring, funding, and liaise with civil society. Each state is then free to adopt its policies within this framework and according to its specific exigencies. It is significant that the European Commission has decided to adopt this document, in that the "Roma question" not only is common to all states but also represents the first non-territorial minority that is directly addressed by a European institution for its effective protection.

the general trend of the nation-state's evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric state into a civic state and from a purely civic state into a multicultural state where specific rights are recognized with regard not only to physical persons but also to cultural or national communities.

What would then be the future shape of Europe? And, especially, what would be the future shape of the EU? The recognition of de-territorialized communal identities implies the co-existence of different groups and peoples, which share maybe not culture, certainly not language, probably not religion, presumably not ethnicity, but certainly do they share values and principles. In this sense, Europe would be a constitutional homeland, the members of which are bound by constitutional patriotism, which "designates the idea that political attachment ought to center on the norms, the values, and, more indirectly, the procedures of a liberal democratic constitution;" as a consequence, "political allegiance is owed primarily neither to a national culture… nor to 'worldwide community of human beings'…" but to shared principles.[87] The idea of Europe as a constitutional community toward which states' and citizens' loyalties have increasingly shifted is first based on the process of European integration and the progressive construction of a legally and politically constitutional community.[88] However, this notion of patriotism is a sort of substitute for cultural or ethnic nationalism insofar as it focuses on what is common, on what is shared, on what is "identical," and apt to create a new supra-particular nation, *i.e.* the European nation.

It has been shown that the creation of a supra-national institution, although capable of attracting loyalties and building political myths and, ultimately, identity, enhances sub-national identification that co-exists with supra-national identity by weakening national identities.[89] Moreover, as Weiler emphasizes, the idea of Europe does not pertain to the building of a supra-national identity or to the creation of an all-including general identity into which specific identities merge. On the contrary, it is "the decoupling of nationality and citizenship" that "opens the possibility, instead, of thinking of co-existing multiple *demoi*."[90] In this sense, the idea of Europe

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[87] MÜLLER, J.-W., *Constitutional Patriotism*, Princeton University Press, Princeton, 2007, pp. 1-2.

[88] HABERMAS, J., "Why Europe Needs a Constitution?" in: *New Left*, vol. 11/2011, pp. 5-26.

[89] OPP, K.-D., "Decline of the Nation State? How the European Union Creates National and Sub-National Identifications" in: *Social Forces*, n.º 84/2, 2005, pp. 653-680.

[90] WEILER, J.H.H., "Demos, Telos, Ethos and the Maastricht Decision" in: GOWAN, P., ANDERSON, P., (eds.) *The Question of Europe*, ed. Verso, London, 1997, p. 287.

includes both states and nations, as well as both regions and *demoi*, understood as cultural communities without boundaries. Europe should then be considered as the homeland of citizens that live in states, which together with peoples form the European Union.

The state as an institution would not be superseded by other actors; indeed it has and it will have a role in implementing policies elaborated at the European level. However, the idea that the state is the homeland of one people, one culture, and one language, this idea, is superseded by a hybrid polity, the EU, where states and peoples concur in the organization of individuals' lives.